Supreme Court, U. S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-607

HOMER CLIFFORD CLARK, JR.,
Petitioner

versus

STATE OF FLORIDA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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Petitioner, HOMER CLIFFORD CLARK, JR., respectfully prays that a Writ of Certiorari issue to review the judgment of the Florida Supreme Court entered on the 18th day of May, 1977, denying Petition for Writ of Certiorari. Rehearing was denied by Order dated September 2, 1977.

OPINIONS BELOW

The Orders of the Florida Supreme Court denying Certiorari and denying Petition for Rehearing.

JURISDICTION

Jurisdiction in this Court is invoked under 28 U.S.C., Section 1257(3), Petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTION PRESENTED

Did the arrest, search and seizure of Petitioner herein, without a warrant and without probable cause, constitute a violation of the Fourth Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISION INVOLVED

The Constitution of the United States, Amendment IV, provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

Petitioner, HOMER CLIFFORD CLARK, JR., was charged by Information filed in the Office of the Clerk of the Circuit Court of the Tenth Judicial Circuit in and for Polk County, Florida, with "Sale of Heroin" and "Possession of Heroin". (R-1-2) A Motion to Suppress was filed in respect to said charges, raising the legality of the seizure pursuant to the *Fourth and Fifth Amendments* and the due process laws of the *Constitution of the United States.* (R-7) The Motion was twice amended. (R-49-53) After lengthy testimony at hearing on that Motion, on the 24th day of September, 1975, an Order was entered denying the Motion to Suppress

(R-149) Thereafter, Defendant entered a plea of "nolo contendere" to the second Count of the Information, reserving the right to seek review of the previous ruling of the Court and Count One was nolle prossed. (R-151-152, 170) The Defendant was thereupon sentenced to serve five years in the State Prison. (R-169-170) Appeal was taken to the District Court of Appeal, Second District of Florida, challenging, inter alia, violation of Petitioner's rights under the Fourth Amendment to the Constitution of the United States, which appeal resulted in the action of the Trial Court being affirmed. Petition for Rehearing was seasonably filed and denied.

Petitioner then sought from the Supreme Court of the State of Florida a Writ of Certiorari, which was similarly unsuccessful. Likewise, Petition for Rehearing was seasonably filed in that Court and was denied.

STATEMENT OF THE FACTS

On February 8, 1975, Lake Wales police officer Spate received information from an alleged "confidential informant" relative to a heroin purchase. (R-5-6) The "confidential informant" had ostensibly given Spate information in the past, though that information was never of a confidential nature, neither was it the basis for any arrest. The nature of the information given by the "confidential informant" was clearly limited to generic matters which might clearly be within the knowledge of virtually anyone. This information, according to Spate, had been reliable. (R-56-57).

The information given Spate in this cause was that the

"confidential informant" had been approached by a blond-haired guy, whose name was unknown to the "confidential informant", who had sought to sell him some "smack" (a street name for heroin). (R–58-59)

Spate contrived a plot with his "informant" whereby the latter was given a twenty-dollar bill, the serial number of which had been first recorded, and dropped the "informant" off at a spot where he was to attempt to induce the suspect to make a sale, after which he was to be dropped off at a bar and give a prearranged signal if he had made a buy and if the suspect still had heroin in his possession. (R-59)

Subsequently Spate observed his "confidential informant" get out of a car in which there were two white males and give the pre-arranged signal. (R-60) Spate then called a "blind broadcast" to all other cars in the area to stop the particular vehicle, described the car and indicated that there were two white males with a blond white male in the passenger seat. He gave no reason for his instructions. (R-60-61) Patrolman Miller pulled the car over, and the car had not completely stopped when Spate arrived at the scene. Miller got two subjects from the vehicle, one dark haired person who had been driving and a blond who had been a passenger. According to Spate, he looked into the car and observed a bag of marijuana on the floor board of the driver's side. (R-62-63)

Spate then ascertained that the driver was Barry Martin and the passenger your Petitioner, whereupon he placed them both under arrest for felony possession of marijuana. Spate then informed them he was going to impound and search the vehicle. (R-65)

A search was made of the car at the scene by Spate, and other than the bag of marijuana which Spate claimed to have observed initially, nothing else was found. An auxilliary officer then towed the car to the police state where Defendants were also transported in separate vehicles. Approximately one half hour later, Martin's car was again searched and this time a baggie was located underneath the front seat on the passenger side, which baggie allegedly contained heroin. (R-66-69)

Martin, owner and operator of the subject vehicle, indicated that he had seen Petitioner and a colored male later identified as Willie Sessions, and they had asked him to drop Sessions off at a bar, which he had agreed to do. He said he committed no traffic offense but nevertheless was stopped by patrolman Miller and charged with illegally changing lanes. (R-98)

WHY THE WRIT SHOULD BE GRANTED

The initial stopping of the subject vehicle was without probable cause and in violation of the *Fourth Amendment* to the *Constitution of the United States.* This Tribunal long ago recognized that the right of citizens to travel on the nation's highways could not be impaired by governmental authority without the existence of probable cause. *Caroll v. United States*, 267 U.S. 132 (1925). Undeniably, there was an utter absence of probable cause at the time Miller stopped the vehicle and arrested Petitioner. In that vein, the Sixth Circuit Court of Appeals, in *Worthington v. United States*, 166 F.2d 557 (1948), said:

"The Fourth Amendment guarantees the right

of the individual to be secure against unreasonable arrests as well as against unreasonable search . . .Its protection extends to all equally - to those justly suspected and accused as well as the innocent; to offenders, as well as the law-abiding. . . ."

and

"An arrest may be made, without a warrant, for a felony although its commission was not in the presence of the arresting officer, provided the officer had probable cause to believe the person arrested had committed the felony. *Probable cause for arrest depends upon the particular facts known to the arresting officer, before or at the time of the arrest. . . .If the information at the disposal of the arresting officer is wholly insufficient to justify the issuance of a warrant for arrest, an arrest in such a case* with an invalid warrant, or with no warrant at all, *would be an illegal arrest.*" (Emphasis supplied)

Undeniably, the information in possession of the arresting officers Spate and Miller in the cause sub judice was grossly insufficient upon which to base a warrant, hence under the rationale of the *Worthington* case, supra, their arrest was illegal. It is fundamental that an illegal arrest taints any evidence discovered as a direct result of that arrest! Such "fruit of the poisonous tree" may not support a conviction. *Wong Sun v. United States*, 371 U.S. 471 (1963). Moreover, as this Court has previously ruled, an arrest may not be used as a pretext to search for evidence. *United States v. Lefkowitz*, 285 U.S. 452 (1932).

Further, this Tribunal, in *Preston v. United States*, 376 U.S. 364 (1964), said:

"Once an accused is under arrest and in custody, then *a search made at another place, without a warrant, is simply not incident to the arrest.* Agnello v. U.S., supra, 269 U.S. at 31, 70 L.Ed. at 148. Here, we may assume, as the Government urges that, either because the arrests were valid or because the police had probable cause to think the car stolen, the police had the right to search the car when they first came on the scene. But this does not decide the questions of the reasonableness of a search at a later time and at another place. See Stoner v. California, 376 U.S. 483, 11 L.Ed. 2d 856, 84 S.Ct. 889. The search of the car was not undertaken until the petitioner and his companions had been arrested and taken in custody to the police station and the car had been towed to the garage. At this point there was no danger that any of the men arrested could have used any weapons in the car or destroyed any evidence - ... nor, since the men were under arrest at the police station and the car was in police custody at a garage, was there any danger that the car would be moved out of the locality or jurisdiction. See Carroll v. U.S., supra, 267 U.S. at 153, 69 L.Ed. at 551. We think that *the search was too remote in time or place to have been made as incidental to the arrest and conclude, therefore, that the search of the car without a warrant fails to meet the test of reasonableness under the Fourth Amendment,* rendering the evi-

dence obtained as a result of the search inadmissible. (Emphasis supplied)

The Fifth Circuit Court of Appeals applied the *Preston* rule in a Florida case in *United States v. McKinnon*, 426 F. 2d 845 (1970). In that case, the defendant had been arrested, was in custody and his vehicle had been seized and taken to a garage and locked in a room. Thereafter, without a warrant, the law officers opened the trunk and removed items of alleged contraband. Of that seizure, the Court said:

" . . .a delay in the opening of the trunk for a sufficient time to obtain a search warrant would not have created any substantial risk of the loss or destruction of any evidence of violation of the laws of Florida, of the United States or of any other prejudice to either of them. . . ."

and

". . . we conclude that a search of the trunk without a warrant could not be upheld as legal on the ground that it was incident to a lawful arrest."

That reasoning unqualifiedly obtains in the instant case! Indeed, as this Court said in *Jones v. United States*, 357 U. S. 493 (1958):

"The exceptions to the rule that a search must rest upon a search warrant have been jealously and carefully drawn, and search incident to a valid arrest is among them. . . ."

No such exceptions appear in the cause sub judice! Officer Miller, who stopped the vehicle in which Petitioner was a passenger, clearly had no cause whatsoever to stop the vehicle, but stopped it solely in reliance upon the "blind broadcast" by Officer Spate, and charged defendant with a minor traffic infraction as a pretext for the arrest. It would be an absurdity to contend that Miller had probable cause. Indeed, it was not until after the improper stopping of the vehicle that the marijuana was discovered on the floor of the vehicle - which clearly was insufficient basis upon which to charge Petitioner with possession of the marijuana or to convict him of possession of heroin on the basis of a subsequent search, remote in time and place from the arrest. In that vein, this Court said in *Beck v. Ohio*, 379 U.S. 89 (1964) that:

"Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it - whether at that moment the facts and circumstances within their knowledge and of which they had *reasonably trustworthy information* were sufficient to warrant a prudent man in believing that petitioner had committed or was committing an offense." (Emphasis supplied)

The validity, then, of the entire case rests upon whether or not the arresting officer had probable cause. In that context, it develops that Willie Sessions, the "confidential informant", had never given the officer *reliable confidential* information in the past. Further, there was reason to believe his "confidential informant" was one of the most irresponsible, shiftless, unemployed,vagrant criminals that has

even been in the County. Clearly, the officer could not have obtained a warrant on the strength of the information allegedly given him by this "confidential informant". Accordingly, if the information in possession of the arresting officer was insufficient upon which to obtain a warrant, under *Worthington v. United States*, supra, that the same information is insufficient upon which to predicate an arrest *without* a warrant! The arrest, then, was clearly invalid and all that ensued is similarly afflicted.

In passing, we are constrained to observe that, even if probable cause to stop the car might have existed, there was undeniably a paucity of factual basis for arresting the passenger! The substance alleged to be marijuana was found on the floor of the driver side of the vehicle. There was nothing to connect Petitioner to the substance save and except his bare presence in the vehicle. This Court has held that, presence alone, unilluminated by other facts, is insufficient proof of possession. *United States v. Romano*, 382 U.S. 136 (1965). The odious substance was clearly not in Petitioner's actual possession, and in the absence of a showing that Petitioner possessed knowledge of the existence of the substance and the ability to maintain control over it or reduce it to his physical possession, could not be said to have even constructive possession thereof.

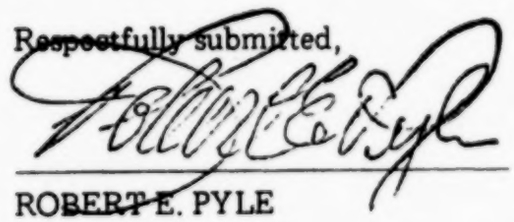
Assuming, arguendo, that the second search of the vehicle was valid, nevertheless, to infer that Petitioner possessed that substance is equally untenable for the same reasons. It is simply unreasonable to attribute to a passenger in another's vehicle actual or constructive possession of a substance found up in the underpinnings of that vehicle, in the absence of further information bearing thereon.

Even after the odious arrest and search, then, the officers were still lacking probable cause!

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the Supreme Court of Florida should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct copies of the foregoing Petition for a Writ of Certiorari to the Supreme Court of Florida have been served upon the Honorable Robert Shevin, Attorney General, The Capitol, Tallahassee, Florida 32304, by Air Mail, this 19th day of October, A.D., 1977.

Robert E. Pyle
Of Counsel